



DATE: September 8, 1988
CASE NO. 87-INA-672

IN THE MATTER OF

ANONYMOUS MANAGEMENT
Employer

on behalf of

SELWYN IVAN MILLER
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill,
Schoenfeld, and Tureck, Administrative Law Judges

Nicodemo DeGregorio
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available, and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certifications are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (hereinafter AF), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

Anonymous Management, the Employer, is an entertainment agency located in Los Angeles, California. On May 14, 1986 the Employer filed an application for labor certification on behalf of the Alien, Selwyn Ivan Miller. The Alien's job title is Booking Manager, and the duties of the position include the following:

Negotiate contracts and schedule bookings, advance ticket sales and promotional activity for domestic and international Rock n' Roll entertainers and bands. Arrange for groups to tour the U.S. from South Africa and Great Britain and for U.S. groups to tour South Africa, Australia, New Zealand and Great Britain. Establish travel itineraries, and stadium or concert hall rentals/leases, verify press releases and security for entertainers. Meet with personal managers, entertainment attorneys and booking agents. Audition new talent and research popularity and acceptance of groups through surveys and polling agencies. Arrange billing and payments according to contract. (AF 22).

The Employer described the minimum requirements as three years experience in the job offered. The Alien's qualifications include over 19 years experience in a booking agency. (AF 22-24, 295-96).

After filing the application, the Employer placed an advertisement in the Hollywood Reporter that ran for a period of three days requesting interested parties to send a resume. Employer also posted a job notice for a period of ten working days on its business premises. On November 5, 1986 the Employer reported that there were no responses to the job posting but that there were forty-two responses to the advertisement. Of these, the Employer rejected thirty-nine on the basis of their written responses to the advertisements. The Employer interviewed the remaining three applicants but later rejected them on the basis of their interviews and concluded that there was no qualified, available and willing United States worker to fill the position. (AF 26-29, 280-82, 286).

On April 24, 1987 the Certifying Officer issued a Notice of Findings raising two issues. First, the Certifying Officer stated that it is the responsibility of the Employer to demonstrate a good faith effort to consider and hire a qualified U.S. worker according to 20 C.F.R. 656.21(b)(1). Secondly, the Certifying Officer required the Employer to submit "conclusive" documentary evidence of specific job-related reasons for the rejection of any U.S. worker and to show how each rejected U.S. applicant cannot perform the basic job duties. For this second issue the Certifying Officer cited 20 C.F.R. 656.21(j)(1)(iv). Incorporated into the Notice of Findings was information received from an inquiry made on March 13, 1987 to Mr. Sanford Feldman, one of the thirty-nine U.S. applicants originally rejected by the Employer. Based upon Mr. Feldman's responses to the inquiry, the Certifying Officer stated that the Employer had not shown

"conclusively" that Mr. Feldman did not meet the job qualifications. The Certifying Officer reached the same result with regards to U.S. workers L. B. Filo, Rick Picone and Daniel Jakub Sladek whom the Certifying Officer described as having "much qualifying experience." The Certifying Officer stated that in the absence of documentation to the contrary, these four U.S. workers would be considered qualified and available at the time of initial consideration and referral.

On May 29, 1987 the Employer submitted its rebuttal. The Employer stated that Messrs. Feldman, Filo and Picone had demonstrated experience as a road manager but not as a booking manager and that Mr. Sladek lacked experience in the field entirely. The Employer explained that the booking manager's job is conceptual in nature and entails the creative aspect of arranging a tour. The job of the road manager, however, is mainly technical in that it entails the carrying out of the plans that have already been made by the booking manager. The Employer asserted that the performance of the one job does not prepare one for the performance of the other. The Employer concluded by saying that it was justified in rejecting these four U.S. workers because their resumes did not demonstrate sufficient experience to meet the job qualifications. (AF 6-12).

On June 12, 1987 the Certifying Officer issued his Final Determination denying certification based upon the two grounds mentioned in the Notice of Findings. After reviewing the rebuttal evidence, the Certifying Officer found that Messrs. Filo, Picone and Sladek "may meet some of the minimum qualifications" but that Mr. Feldman is the most qualified of the four contenders. The Certifying Officer stated that an employer who is serious about considering applicants for a job will at least give an apparently qualified applicant an interview and that without the benefit of an interview, it cannot be determined conclusively whether or not Mr. Feldman is qualified. The Certifying Officer concluded that simply to write off Mr. Feldman and say that he is not qualified without the benefit of an interview is not within the spirit of the law. (AF 3-5).

Discussion

I

In his Final Determination, the Certifying Officer stated that the Employer remained in violation of two different regulations, the first being 20 C.F.R. 656.21(b)(1). However, a careful reading of that provision reveals it to be inapplicable to the facts of this case. The provision states the following:

If the employer has attempted to recruit U.S. workers, prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers. . . . (emphasis added)

The evidence in the record shows that the Employer's recruitment efforts began after the filing of the application, not before, and that the U.S. workers referred to by the Certifying Officer in his Notice of Findings and Final Determination were products of that post-filing recruitment process. (AF 22-23, 26-29, 280-82, 286). The Certifying Officer's reliance on Section 656.21(b)(1) is therefore misplaced and cannot stand as a ground for the denial.

II

The Certifying Officer's reliance on Section 656.21(j)(1)(iv) is also misplaced. That regulation applies to post-filing recruitment efforts and states the following:

The report of recruitment results shall:

X X X X X

- (iv) Explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed. (emphasis added)

The Notice of Findings and the Final Determination name as apparently qualified for the position four U.S. workers who were the products of post-filing recruitment. However, none of these four applicants was ever interviewed by the Employer. Indeed, the fact that the Employer did not interview them was the major focus of the Final Determination. (AF 4-5).

We will assume that when the Certifying Officer cited Section 656.21(j)(1)(iv), he actually had in mind Section 656.21(b)(7), which provides that if U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons. Accordingly, we will consider the merits of the denial under this standard.

III

The Employer asserts in its appeal that the Denial was arbitrary and capricious and an abuse of discretion in that the Certifying Officer never questioned the validity of the minimum requirements for the job, and that the Employer was therefore entitled to rely on those minimum requirements as a yard stick to measure the qualifications of any applicant for the position. The Employer further asserts that since the four U.S. workers named by the Certifying Officer did not meet those minimum requirements, the Employer was under no obligation to interview those applicants. (AF 1-2). We agree with the Employer on both points.

In In the Matter of Microbilt Corporation, 87-INA-635 (January 12, 1988), we held that the ETA 750A form is the Employer's opportunity to state in detail the minimum requirements for a position, and that an applicant is ordinarily qualified for the job if he meets those requirements. Section 656.21(b)(2) provides the Certifying Officer with an opportunity to question those job requirements. In the instant case, however, the Certifying Officer did not question the minimum requirements. The Employer was therefore justified in relying on those qualifications as a standard by which to judge applicants.

In his Notice of Findings the Certifying Officer named four U.S. workers as having qualifying experience for the position. Following the Employer's rebuttal, the Certifying Officer retreated from his original position with regards to three of the U.S. workers, and based the denial on the rejection of Mr. Sanford Feldman. (AF 3-5, 13-15). First, it should be noted that Mr. Feldman's response to Employer's advertisement (AF 36) was in the form of a short letter. It contains no names of employers, dates of employment, job titles held by the applicant, or educational summary; in short, it is not a resume. In fact, it appears to be the shortest and least

detailed of the 42 written responses received by Employer (see, e.g., AF 31-35, 86-217). Further, as the Employer pointed out in Rebuttal, Mr. Feldman's letter did not mention any experience in arranging travel itineraries, arranging stadium and concert hall rentals, meeting with managers, attorneys, booking agents, auditioning new talents, conducting surveys, or arranging billing and payment according to contract. In addition, there is no way to determine on the basis of Mr. Feldman's letter whether he has three years of full time experience in the job offered as required by the ETA 750A. (AF 9-10, 22, 36).

In In the Matter of ENY Textiles, 87-INA-641 (January 22, 1988), we held that the employer in that case properly decided on the basis of a resume that a U.S. worker lacked the minimum qualifications necessary for the position offered, and that the rejection of this applicant on the basis of a resume alone was proper. We further held that the worker's lack of qualification for the position offered was "clear from a comparison of his resume with the Employer's job requirements." Id. at 5.

Conversely, in In the Matter of Arcadia Enterprises, Inc., 87-INA-692 (February 29, 1988), we found that the Employer had improperly rejected an apparently qualified U.S. worker without an interview. The Employer asserted that the poor grammatical construction of the U.S. worker's cover letter demonstrated that her written English was deficient to the extent that she could not perform the basic job duties. We agreed with the Certifying Officer that this evidence, without an interview, was not sufficient to show that the worker was not qualified.

Finally, we have upheld a denial of certification under 20 CFR 656.21(b)(7) where a U.S. worker appeared sufficiently qualified to merit further contact and consideration, the certifying officer suggested a personal interview of the worker, and the employer refused to grant it. In the Matter of Norwest Bank Minneapolis, 87-INA-658 (April 13, 1988).

We believe these decisions support at least the following propositions: (1) there is no requirement in the regulations that an employer must interview every U.S. applicant for the job offered to an alien; and (2) where an applicant's response to an employer's advertisement fails to show that the applicant meets the minimum requirements for the job, the employer may reject the applicant on the basis of the response alone, in the absence of additional relevant information from other sources or a reasonable request by the Certifying Officer that the applicant be interviewed.

Reviewing the facts of this case in light of these rules, we must conclude that the denial of certification cannot be affirmed. Employer had rejected Mr. Feldman on the ground that he did not have three years of experience in the job offered. This assessment was based on Mr. Feldman's brief response to the advertisement. In the Notice of Findings the Certifying Officer did not refer to Mr. Feldman's letter, but quoted extensively from responses which Mr. Feldman had made to a questionnaire of the Certifying Officer. The Notice of Findings pointedly stated that it "was not to be considered a request for the employer to attempt to re-contact or re-interview the applicant. Documentation must be provided showing that the applicants were not qualified, willing or available at the time of initial consideration and referral." (AF 15).

Because the Certifying Officer did not dispute Employer's evaluation of Mr. Feldman's response, i.e., that it did not even appear to meet Employer's unquestioned requirements for the job, and because the Certifying Officer, when armed with additional information from a questionnaire, did not request, but in fact precluded, an interview, we are of the opinion that Employer had no obligation to further explore Mr. Feldman's qualifications through an interview. It follows that Employer's failure to interview Mr. Feldman is not proof of bad faith, and that the rejection of Mr. Feldman on the basis of his resume was for a job-related reason within the meaning of 20 CFR 656.21(b)(7). Accordingly, the denial of certification will be reversed.

ORDER

The determination of the Certifying Officer denying labor certification is reversed, and the labor certification is hereby granted.

NICODEMO DeGREGORIO
Administrative Law Judge

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ANONYMOUS MANAGEMENT, 87-INA-672
Judge LAWRENCE BRENNER, dissenting.

In my opinion, Mr. Feldman's letter responding to the advertisement clearly showed sufficient experience as a "Booking Manager" to require the Employer to interview him for the job. Employer's view that the letter showed Mr. Feldman only to be a "road manager" technocrat carrying out plans layed by others is without merit. Mr. Feldman's letter states that he has "negotiated contracts, scheduled bookings, handled the promotion and advertising and ticket sales for many concert shows, as follows: (AF 36)". He lists several domestic concerts, states that he also managed a theater for two seasons, and adds that he has done shows in other countries and is very familiar with all aspects of this business. He closes, sensibly, with: "In the event that you need further information, I will be glad to furnish same (Id.)".

The Employer's carping rebuttal that perhaps, after all, Mr. Feldman's letter did state that he had performed some of the duties of a booking manager, but had omitted others, shows the bad faith of this Employer (AF 10). The Employer stated it did not deign to interview Mr. Feldman after receiving his letter because he did not mention specifically "arranging stadium and concert hall rentals, meeting with managers, attorneys, booking agents, auditioning new talents, conducting surveys, or arranging billing and payment according to contract (Id.)".

In other words, Mr. Feldman's letter did not specifically address each and every detail of the Employer's lengthy job duties set forth on the application for alien labor certification (form 750-A) (AF 22). The general description of the duties also set forth on the Employer's application form, and included in Mr. Feldman's letter stating his experience, subsumes those details sufficiently to require an interview. Moreover, ignored by the Employer, and by my

colleagues who would grant certification, is the significant fact that the newspaper advertisement to which Mr. Feldman was responding did not include a specification of the duties which Mr. Feldman is now faulted for having omitted (AF 280). See The Quay Restaurant, 87-INA-504 (Nov. 19, 1987). This is nothing less than Kafkaesque.

It is true that Mr. Feldman did not list enough information to specify that he had three years of experience in the booking manager duties he listed. However, the specific shows he lists and other statements in the letter leads easily to be inference that his experience spans more than the minimum three years. This ambiguity could and should have been resolved by an interview, which as a preliminary step could have been conducted easily by telephone.

This case fits squarely under Norwest Bank Minneapolis, *supra*, cited by my colleagues. See also, Microbilt Corp., 87-INA-635 (Jan. 12, 1988). Mr. Feldman's letter shows that he apparently met the basic requirements for the job set forth in the Form ETA 750-A, and certainly and more importantly those stated in the newspaper advertisement, thereby requiring the Employer to contact him in some fashion to learn more about Mr. Feldman's qualifications. This is unlike the decision in Eny Textiles, 87-INA-641 (Jan. 22, 1988), authored by myself, where it was clear from the resume that the U.S. applicant's experience was not the type of experience required for the job.

The questionnaire filled out by Mr. Feldman at the C.O.'s request, and included with the Notice of Findings, reenforces the fact that Mr. Feldman met the qualifications including many years of experience (AF 16). Curiously, and erroneously, the C.O. in his Notice of Findings precluded from possible rebuttal and corrective action by the Employer a recontact or interview with Mr. Feldman (AF 15). Just as the C.O. contacted Mr. Feldman to check his experience, it should have been left upon the Employer to contact Mr. Feldman for the purpose of verifying his experience in an attempt to cure the deficiency found by the C.O. in the Notice of Findings. Of course, whether or not Mr. Feldman was still available for the job many months after the recruitment period would have been irrelevant. Dove Homes, Inc., 87-INA-680 (May 25, 1988) (*en banc*).

As a result of the C.O.'s error, which deprived the Employer of an attempt to cure the deficiency, I cannot affirm the C.O. I would remand to permit the Employer to attempt to contact Mr. Feldman to try to show the C.O. that Mr. Feldman in fact lacks three years of experience as a booking agent, despite his assertions that he has the experience. If Mr. Feldman cannot be recontacted for that purpose at this late date, then the C.O. should permit the Employer to undertake a new recruitment of U.S. workers.

Although unnecessary to the result I reach in this case, I note my disagreement with my colleagues' apparent view that when experience is required in the "job offered" each and every duty listed at length in the job description by an employer must have been part of the duties performed by a U.S. applicant as part of the applicant's experience in the listed job, unless the C.O. objected to the specific duties. Cf. Microbilt Corp., *supra*. We have held that job titles alone do not control; it is the nature of the experience which counts. Integrated Software Systems, 88-INA-200 (July 16, 1988). However, where a U.S. applicant has the experience in the same

basic job, but not each detail specified, the C.O., and the Board can find that the Employer has not shown that the U.S applicant lacks the required basic job experience such that he cannot perform the job required by the employer. In such a case, the burden is on the employer to show that experience in a specific duty is necessary for its job, despite the fact that the U.S. worker has the requisite length of experience in the normal basic duties of the "job offered".

LAWRENCE BRENNER
Administrative Law Judge